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Law Done Backwards: The Tightening Of Civil And Loosening Of Criminal Protections

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Uzair Kayani

Abstract

This article shows how protections for civil defendants arguably exceed protections for criminal defendants, and considers some constitutional and practical implications of this ongoing shift.

LAW DONE BACKWARDS: THE TIGHTENING OF CIVIL AND LOOSENING OF CRIMINAL PROTECTIONS

UZAIR KAYANI*

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I. INTRODUCTION: THE CIVIL AND CRIMINAL SYSTEMS

The broad differences between criminal and civil actions are well understood.¹ First, a civil action is typically brought by a plaintiff, whereas a criminal action is brought by the state.² Second, the typical civil remedy are

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1. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 289 (2000).

2. *Id.*; ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 458 (6th ed. 2012). "In a civil suit the plaintiff is a private individual—the victim. In a criminal prosecution the plaintiff is society as represented by the public prosecutor or attorney general." COOTER & ULEN, *supra*.

damages awarded to the plaintiff, whereas typical criminal remedies are a fine to the state or imprisonment.³ Third, civil damages are generally compensatory and meant to make the plaintiff whole—that is, indifferent to the wrong done—whereas criminal penalties are neither compensatory, nor equal to the harm caused.⁴ Fourth, criminal litigants always have legal expertise, with the state prosecutor on one side and guaranteed defense counsel on the other, whereas civil litigants must pay for legal representation and may forego it.⁵ Fifth, criminal defendants have a right to a jury, whereas civil defendants generally do not.⁶ Sixth, people accused of crimes have broader rights to withhold unfavorable information and receive favorable information from the prosecutor than civil defendants do.⁷ Seventh, crimes—unlike civil wrongs—usually have an intent element.⁸ And finally, the civil burden of proof at trial is lower than the criminal one.⁹

There is an impression that the criminal process is more exacting for the claimant and more favorable to the defendant than the civil process.¹⁰

3. COOTER & ULEN, *supra* note 2, at 459–60; FRIEDMAN, *supra* note 1, at 289.

4. See COOTER & ULEN, *supra* note 2, at 460. “Compensation in civil law aims to restore the victim’s welfare at the expense of the injurer. Punishment in criminal law makes the injurer worse off without directly benefiting the victim.” *Id.*

5. See Nancy Leong, *Gideon’s Law-Protective Function*, 122 YALE L.J. 2460, 2476 (2013); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1505 (1999).

Criminal trials have several characteristics that render appointed counsel appropriate. First, the government is not only a litigant, but also the employer of many of the witnesses—for example, law enforcement officers—whom it calls at trial. Second, the government supplies the attorney to argue for its position, which inherently means that the advantage in terms of resources, institutional knowledge, and credibility usually lies with the prosecution. Third, the subject of litigation involves immense power disparities between the individual and the government—that is, the individual is simply no match for the government at any stage leading up to a criminal proceeding, ranging from the earliest stages of investigation to the moment of arrest. Fourth, in criminal cases, the government’s position is inherently always represented. Fifth and finally, the evidence of abusive behavior by law enforcement officers throughout our criminal justice system renders counsel particularly appropriate when the circumstances leading to the litigation involve law enforcement.

Leong, *supra*, at 2476–77 (footnotes omitted). “Another but consistent way to explain the difference between the criminal and civil burdens of proof is by reference to the inherent advantages of the prosecution in a criminal case” Posner, *supra*, at 1505.

6. See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

7. See U.S. CONST. amend. V; *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

8. FRIEDMAN, *supra* note 1, at 288.

9. *Id.*

10. See NAT’L CTR. FOR VICTIMS OF CRIME, CIVIL JUSTICE FOR VICTIMS OF CRIME (2001) [http://www.victimsofcrime.org/docs/Public%20Folders/Civil%20Justice%20-%20FINAL%20\(non-book\).pdf?sfvrsn=0](http://www.victimsofcrime.org/docs/Public%20Folders/Civil%20Justice%20-%20FINAL%20(non-book).pdf?sfvrsn=0); Robert F. Kennedy, *Law Day Address*, 13 U. CHI.

This view is based on constitutional protections provided explicitly to the criminal defendant and not to the civil one.¹¹ The view is apparently confirmed when we observe a defendant prevailing against a criminal claim and failing against a corresponding civil claim.¹² The purpose of this Article is to challenge this wisdom.* It will be argued that the criminal claimant—the state—is not more encumbered than the civil one, and though there are practical reasons for this, the low thresholds for criminal prosecution seem to conflict with the constitutional scheme.*

Civil protections in aggregate may well be greater than criminal protections.¹³ This is reasonable enough, since the prosecutor of a criminal claim typically has weaker incentives to invest in the legal process, and often lower resources, than a private plaintiff does.¹⁴ If the benefits from a criminal case were lower, and the costs higher than in the corresponding civil case, then criminal prosecution could go the way of the dodo.¹⁵ Whether that would be a good or a bad thing is unclear.¹⁶ Briefly, we consider some arguments for the coexistence of the two systems: First, some cases involve positive externalities, where a civil claimant would not find it worthwhile to bring a case, but society as a whole would be better off if the case were pursued;¹⁷ however, this could explain why the state might bring a case, but not why that case would be criminal rather than civil.¹⁸ Second, in some cases, the offender is judgment proof—that is, too resource-constrained to be able to pay large damages—and therefore, unresponsive to the threat of a hefty damages award; however, if this were decisive, then the only difference

L. SCH. REC., Winter 1965, at 24, 26. “We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.” Kennedy, *supra*, at 26.

11. See U.S. CONST. amends. V, VI.

12. See FRIEDMAN, *supra* note 1, at 281. A prominent example is the criminal acquittal versus civil liability for O.J. Simpson. *Id.*

13. See NAT’L CTR. FOR VICTIMS OF CRIMES, *supra* note 10, at 6–7.

14. See FRIEDMAN, *supra* note 1, at 286; Posner, *supra* note 5, at 1505; Steve Schmadeke, *Public Defender, State’s Attorney Raise Alarm About Steep Cook County Budget Cuts*, CHI. TRIB. (Oct. 23, 2017, 5:45PM), <http://www.chicagotribune.com/news/local/breaking/ct-met-cook-county-states-attorney-foxx-budget-cuts-20171023-story.html>.

15. See *First Estimates of Judicial Costs of Specific Crimes, from Homicide to Theft*, RAND CORP. (Sept. 12, 2016), <http://www.rand.org/news/press/2016/09/12.html>; Schmadeke, *supra* note 14.

16. See Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334, 336 (1982).

17. See *id.* at 334, 336. “[H]igh legal expenses of plaintiff, low expenses of defendants, a low level of loss, [and] a large reduction in net expected losses due to liability tend[] to increase the likelihood that there will not be [a private] suit when it would be socially desirable.” *Id.* at 336.

18. See *id.* at 334, 336.

between criminal and civil actions would be the penalties and not the procedural or substantive rules.¹⁹ Third, the criminal process may exist because, in solving the two previous problems, the law faces the possible collusion of investigators, prosecutors, and judges when all of these roles are played by the government; this possibility could explain both the existence of the criminal system and more exacting rules—such as jury involvement, publicity, guaranteed defense, the defendant’s special rights, and a higher burden of proof.²⁰ It is still arguable that collusion, externalities, and judgment proofness problems could be solved by subsidizing a private plaintiff’s case, or by offering the plaintiff some reward, rather than erecting an entire parallel system of justice so that the case for criminal law remains vulnerable.²¹ Indeed, such an alternative system may have supplanted criminal law if criminal prosecution were, in fact, more challenging than a civil suit, as the Constitution seems to demand.²² However, assuming that the criminal process is worth preserving for social or political purposes, it will be argued that it is sustained, in part, by the constitutionally problematic relative ease of pursuing criminal prosecution versus a civil suit.²³

The government’s incentives in pursuing a criminal charge may be weaker than a private plaintiff’s incentives in a corresponding civil suit; the successful private plaintiff will typically receive damages that make her whole, whereas a successful prosecution results in a penal sanction that may be of lesser value to the prosecutor.²⁴ There are two reasons for this: First, some portion of a penal sanction often serves to stigmatize or incapacitate the defendant rather than redistribute value; and such a sanction is of limited value to the prosecutor’s office.²⁵ Second, even if part of the criminal sanction is monetary, or even granting that stigma, and incapacitation of the defendant does provide utility, that utility is not captured entirely by the prosecutor’s office, but is distributed across society.²⁶ While the private plaintiff can expect to internalize most of the benefit of a successful claim, a prosecutor is unlikely to internalize the entire benefit of a successful

19. FRIEDMAN, *supra* note 1, at 282–83; Shavell, *supra* note 16, at 334.

20. See U.S. CONST. amend. VI; FED. R. CRIM. P. 23; *In re Winship*, 397 U.S. 358, 361 (1970); FRIEDMAN, *supra* note 1, at 289, 291; Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 12–13 (1961).

21. See FRIEDMAN, *supra* note 1, at 282–83, 291; Shavell, *supra* note 16, at 334.

22. See U.S. CONST. amend. VI, VII; FRIEDMAN, *supra* note 1, at 286.

23. See FRIEDMAN, *supra* note 1, at 289, 291; Leong, *supra* note 5, at 2462.

24. See COOTER & ULEN, *supra* note 2, at 460; Shavell, *supra* note 16, at 334.

25. See COOTER & ULEN, *supra* note 2, at 459–60.

26. See *id.*

prosecution.²⁷ It follows that a prosecutor's incentives in pursuing a criminal case will often be weaker than a civil plaintiff's in pursuing a private claim.²⁸

Compounding the effect of weaker incentives is often the prosecutor's lowest resource.²⁹ It has been observed that prosecutor workloads in some jurisdictions are so heavy to virtually ensure malpractice.³⁰ While the civil plaintiff is also resource constrained—and while the mismatch between a well-heeled civil defendant and plaintiff can be starker than that between criminal litigants—the civil plaintiff typically has more control over her caseload, and is unlikely to take on multiple court appearances a day or hundreds of cases in a year.³¹

Admittedly, this incentives story is complicated by the fact that while the prosecutor does not reap the entire benefit of a prosecution, she also does not bear its full cost.³² Absent a statutory or contractual provision, the successful plaintiff still bears the costs of litigation, whereas the prosecutor's costs are borne by the government.³³ There are two reasons for the prosecutor's lower costs: First, the costs of criminal investigations are borne primarily by law enforcement agencies.³⁴ Second, agency costs—that is, the costs of shirking or monitoring incurred by a principal because of her agent's divergent incentives—are also lower for the prosecutor than for a private plaintiff, because the prosecutor is effectively acting for her own office under her own budget, rather than for a client.³⁵ Nevertheless, the heavy caseload and limited budget of the prosecutor's office may overwhelm these cost advantages.³⁶

27. See *id.* at 458–60; Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 287 (2011); Posner, *supra* note 5, at 1505.

28. See COOTER & ULEN, *supra* note 2, at 458–60; Gershowitz & Killinger, *supra* note 27, at 264; Posner, *supra* note 5, at 1505.

29. See Gershowitz & Killinger, *supra* note 27, at 264, 286–87.

30. See *id.* at 263. “[M]any prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage.” *Id.*

31. See *id.* at 263–64, 287.

32. See Posner, *supra* note 5, at 1505.

33. See *id.* “The government has enormous prosecutorial resources.” *Id.* (citing U.S. DEP’T OF JUSTICE, NCJ 170092, PROSECUTORS IN STATE COURTS, 1996, at 1 (1998); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1999, at 240 (1998)).

34. See Posner, *supra* note 5, at 1505 n.59.

35. See PHYLLIS E. MANN, NAT’L LEGAL AID & DEF. ASS’N, UNDERSTANDING THE COMPARISON OF BUDGETS FOR PROSECUTORS AND BUDGETS FOR PUBLIC DEFENSE (2011); Gershowitz & Killinger, *supra* note 27, at 264, 287; Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 96 n.60, 120 (2008).

36. MANN, *supra* note 35; Gershowitz & Killinger, *supra* note 27, at 262–63.

The legal system has evolved, in a way, around the lower incentives and resources of the criminal prosecutor.³⁷ The solution—both counter-intuitive and constitutionally delicate—is to lower the costs of prosecution by applying permissive thresholds that counterbalance many of the constitutional protections that appear to hamstring the prosecutor.³⁸ Concurrently, the legal system has moved to restrict civil cases by imposing higher thresholds for the civil plaintiff in various areas.³⁹ This Article details how these changes have been accomplished and how they tend to encourage criminal litigation in an already overburdened penal system, while discouraging its sometime viable, and perhaps superior, substitute—the civil case.⁴⁰

The sequel is composed of four parts.⁴¹ Part II explains the advantages of a criminal defendant over a civil one.⁴² These include the criminal defendant's access to favorable evidence procured by the prosecutor; the defendant's right to withhold inculcating evidence; the requirement that the prosecutor achieve a unanimous jury verdict; the publicity of the trial; the higher burden of proof in the criminal case; and the double jeopardy rule that protects a successful defendant from re-litigation.⁴³ Part III contrasts this with the peculiar advantages of civil defendants over criminal ones.⁴⁴ These include the higher threshold for a civil complaint versus a criminal grand jury indictment; the judicial supervision of civil discovery versus the broad leeway for criminal police investigations; and the

37. See COOTER & ULEN, *supra* note 2, at 460, 474–76; Gershowitz & Killinger, *supra* note 27, at 262–63.

38. See COOTER & ULEN, *supra* note 2, at 474–76; *The Right to a Public Defender*, JUSTIA, <http://www.justia.com/criminal/procedure/miranda-rights/right-to-public-defender/> (last visited Apr. 18, 2018).

39. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2118–19 (2015).

40. See Gershowitz & Killinger, *supra* note 27, at 264–65; Alec Walen, *Proof Beyond a Reasonable Doubt: A Balanced Retributive Account*, 76 LA. L. REV. 355, 374–76 (2015).

41. See *infra* Part II–V.

42. See *infra* Part II.

43. U.S. CONST. amend. V; *Kyles v. Whitley*, 514 U.S. 419, 432–33 (1995); Mueller, *supra* note 20, at 13–14; *Evidentiary Standards and Burdens of Proof*, JUSTIA: TRIALS & LITIGATION, <http://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/> (last visited Apr. 18, 2018); Janet Portman, *Jury Verdicts in Criminal Trials: Unanimous, or Not?*, LAWYERS.COM: CRIM. L., <http://www.lawyers.com/legal-info/criminal/criminal-law-basics/jury-voting-requirements-to-return-a-verdict.html> (last visited Apr. 18, 2018).

44. See *infra* Part III.

absence of a civil defendant's right to legal representation.⁴⁵ Part IV considers various reasons that may explain the contrast between these two regimes.⁴⁶ Part V considers some implications of this divide.⁴⁷

II. THE ADVANTAGES OF CRIMINAL DEFENDANTS OVER CIVIL ONES

A. *Private Information and Asymmetric Disclosure*

Both sides in a legal case have private information that is only partially revealed through the trial process.⁴⁸ While revelation is roughly symmetric in the civil case, it is asymmetric in the criminal one because the Constitution gives the criminal defendant a right to withhold unfavorable information, while imposing a duty on the prosecutor to reveal exculpatory evidence to the defendant.⁴⁹ As explained below, this asymmetric disclosure advantages the criminal defendant over the civil one.⁵⁰

Different actors in the legal process have different private information.⁵¹ In some cases, this private information is protected by law.⁵² Divergent information leads to divergent beliefs, which are not easily corrected; essentially, the public information—information that is available to all direct participants—has to overwhelm each actor's private information in order for their beliefs to converge.⁵³ The greater the disjunction in protected private information—and therefore in beliefs—the greater the amount of shared information is required to make the actors' beliefs coincide.⁵⁴

45. U.S. CONST. amend. VI; FED. R. CIV. P. 26(b)(1); *see also* *Tellabs, Inc. v. Makor Issue & Rights, Ltd.*, 551 U.S. 308, 314 (2007); *United States v. Williams*, 504 U.S. 36, 48 (1992); *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

46. *See infra* Part IV.

47. *See infra* Part V.

48. U.S. CONST. amend. IV; FED. R. CIV. P. 26.

49. *See* *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

50. *See* FRIEDMAN, *supra* note 1, at 282–83.

51. *See* COOTER & ULEN, *supra* note 2, at 383, 393.

52. *See* U.S. CONST. amend. IV; FED. RULE CIV. P. 26(b)(2)(B).

53. *See* Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding — Their Justified Divergence in Some Particular Cases*, 18 *LAW & PHIL.* 497, 499 (1999).

54. *See* D.S. SIVIA & J. SKILLING, *DATA ANALYSIS: A BAYESIAN TUTORIAL* 19 (2d ed. 2006). From a Bayesian perspective: “As the empirical evidence grows, we are eventually led to the same conclusions irrespective of our initial beliefs; the posterior [probability distribution function] is then dominated by the likelihood function, and the choice of the prior becomes largely irrelevant.” *Id.*

Privacy protection promotes the important social goal of limiting the intrusion of the government or other private parties into a person's life and work.⁵⁵ The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁵⁶ The Supreme Court has explained that this right applies to both criminal and civil investigations.⁵⁷ The language of the Amendment does not limit the right to criminal contexts, and "the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other . . . standards.'"⁵⁸

In cases in which the sharing of private information may reduce the divergence in beliefs, the social cost of sharing private facts may outweigh the benefits of symmetric information.⁵⁹ For example, a person's beliefs may be influenced by privileged communications with clergy, lawyers, or psychologists.⁶⁰ Where privacy concerns do not dominate, information asymmetries between litigants are slowly reduced as the legal process continues.⁶¹ For example, in criminal trials, the accused has a right to "be informed of the nature and cause of the accusation."⁶² Similarly, in civil trials, the defendant is entitled to "a short and plain statement of the claim" against her.⁶³ Thereafter, investigations and discovery processes can further force the parties to share unprotected private information.⁶⁴

However, in criminal cases, there is an imbalance where the prosecution is required to share evidence that helps the defendant's case, while the defendant has a right to conceal evidence that would aid the prosecution.⁶⁵ The Court has held that Due Process includes "[t]he prosecution's affirmative duty to disclose evidence favorable to a defendant."⁶⁶ This is the so-called *Brady* disclosure.⁶⁷ In contrast, the

55. *Search and Seizure and the Fourth Amendment*, FINDLAW: LEARN ABOUT L., <http://criminal.findlaw.com/criminal-rights/search-and-seizure-and-the-fourth-amendment.html> (last visited Apr. 18, 2018).

56. U.S. CONST. amend. IV.

57. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). "[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities . . ." *Id.*

58. *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978)); see also U.S. CONST. amend. IV.

59. COOTER & ULEN, *supra* note 2, at 393; Summers, *supra* note 53, at 499–500.

60. See Mueller, *supra* note 20, at 15.

61. COOTER & ULEN, *supra* note 2, at 396.

62. U.S. CONST. amend. VI.

63. FED. R. CIV. P. 8(a)(2).

64. FED. R. CIV. P. 26; see also COOTER & ULEN, *supra* note 2, at 393, 396.

65. U.S. CONST. amend. V; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

66. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

Constitution provides that a criminal defendant cannot “be compelled in any criminal case to be a witness against himself.”⁶⁸ While the language speaks to criminal cases, this protection is also available in at least some civil proceedings.⁶⁹ The Court has achieved this result by distinguishing the *right* against self-incrimination in criminal cases from a *privilege* against self-incrimination in some civil contexts.⁷⁰ While the right must be provided in criminal cases, the privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . [so long as] the witness reasonably believes [that his statements] could be used in a criminal prosecution or could lead to other evidence that might be so used.”⁷¹

Thus, asymmetric disclosure is the norm in criminal cases, but the relative exception in civil ones.⁷² Two points bear mention here: First, the asymmetric disclosure in criminal cases refers primarily to disclosure of facts and not law.⁷³ The concealment of legal information, such as through the attorney work product doctrine, is roughly symmetric in criminal and civil cases.⁷⁴ Second, coupling asymmetric factual disclosure in the criminal case with the absence of a right to legal representation in the civil case—discussed below—we may make a conjecture that civil litigants are relatively likelier to diverge in their legal beliefs because they may lack experienced legal counsel, whereas criminal litigants are likelier to diverge in their factual beliefs.⁷⁵

67. *Id.* at 432–33; *Brady*, 373 U.S. at 87.

68. U.S. CONST. amend. V.

69. *See In re Gault*, 387 U.S. 1, 49 (1967).

70. *Chavez v. Martinez*, 538 U.S. 760, 770 (2003). “Although our cases have permitted the Fifth Amendment’s self-incrimination privilege to be asserted in non-criminal cases . . . that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.” *Id.* (citations omitted); *see also* U.S. CONST. amend. V.

71. *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972) (footnotes omitted).

72. *See id.*; FRIEDMAN, *supra* note 1, at 282–83.

73. *See United States v. Nobles*, 422 U.S. 225, 238 (1975); *Kastigar*, 406 U.S. at 444–45.

74. *See Nobles*, 422 U.S. at 238, 238 n.12.

Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Id. at 238.

75. *See* U.S. CONST. amend. V–VI; *Nobles*, 422 U.S. at 238; *Summers*, *supra* note 53, at 499.

The criminal defendant's access to exculpatory evidence procured by the prosecutor is a valuable advantage.⁷⁶ However, it is an advantage that is increasingly under attack.⁷⁷ The recent trend is to limit the defendant's access to exculpatory evidence that she could have procured herself, had she exercised *reasonable diligence*.⁷⁸ For example, in a 2015 case, the Third Circuit ruled that "*Brady* does not oblige the [G]overnment to provide defendants with evidence that [it] could obtain from other sources by exercising reasonable diligence."⁷⁹ The case was appealed to the Supreme Court, and in an amicus brief, former prosecutors argued that "a rule that excuses a prosecutor from fulfilling her obligation if the defendant could have but did not find the favorable evidence himself. . . . is tantamount to saying that a 'prosecutor may hide, defendant must seek.'"⁸⁰ The former prosecutors urged that similar "decisions of several federal circuits, including the Third Circuit, have undermined *Brady* by shifting focus away from the prosecutor's affirmative obligation to disclose."⁸¹ The Supreme Court declined to review the case.⁸²

B. *The Impartial Decision Maker and Public Scrutiny*

While the fact finder in both civil and criminal matters is impartial, the criminal prosecutor faces a steeper test in establishing facts.⁸³ This is because the fact finder in a criminal case is a jury, which must typically reach a unanimous judgment.⁸⁴ This unanimity requirement means that even where a supermajority of jurors is convinced by the prosecutor, the prosecutor is still unable to secure a favorable verdict.⁸⁵ The civil plaintiff typically only has to convince one person—the judge—whereas the criminal prosecutor has to convince every single juror.⁸⁶

76. *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

77. *See United States v. Georgiou*, 777 F.3d 125, 130, 138–39 (3d Cir. 2015).

78. *United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991).

79. *Georgiou*, 777 F.3d at 140 (quoting *Perdomo*, 929 F.2d at 973).

80. Amici Curiae Brief of Former Federal Prosecutors et al. in Support of the Petitioner at 7, *Georgiou v. United States*, 136 S. Ct. 401 (2015) (No. 14-1535).

81. *Id.* at 3.

82. *See Georgiou v. United States*, 136 S. Ct. 401, 401 (2015) (mem).

83. *See Posner, supra* note 5, at 1496, 1505; Portman, *supra* note 43.

84. *See Portman, supra* note 43; *Types of Juries*, U.S. CTS., <http://www.uscourts.gov/services-forms/jury-service/types-juries> (last visited Apr. 18, 2018). "Final outcome is a verdict, in favor of plaintiff or defendant in a civil case, or guilty, not guilty in a criminal case." *Types of Juries, supra*.

85. *See Portman, supra* note 43.

86. *Bench Trials*, USLEGAL, <http://www.civilprocedure.uslegal.com/trial/bench-trials/> (last visited Apr. 18, 2018);

The impartial decision-maker is meant to ensure fairness, that is, a lack of bias.⁸⁷ Decisions in criminal and civil processes involve either legal or factual matters.⁸⁸ Aside from the plaintiff and defendant, the legal process depends on the decisions of the judge and—where applicable—the jury.⁸⁹ The judge determines legal matters and, in many civil matters, decides factual matters as well.⁹⁰ The fact finder in a criminal case is typically a jury of lay persons, whereas the fact finder in a civil case is typically a judge—though some civil cases use juries too.⁹¹

As the Supreme Court has recently explained, a judge has a constitutional duty to recuse himself in cases where he may have a bias; the test is “whether, as an objective matter, ‘the average judge in his position is likely to be neutral, or whether there is an unconstitutional *potential for bias*.’”⁹² This duty is meant to ensure that the judge does not favor one litigant over another.⁹³ Meanwhile, the practice of *de novo* review of legal questions seeks to ensure that the judge does not give undue weight to a lower decision maker on questions of law.⁹⁴ These two protections against a biased judge are available in both civil and criminal contexts.⁹⁵

Aside from the judge, the main decision-maker in the legal process is the jury.⁹⁶ In the criminal case, the constitutional right to a jury is explained as follows: “Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;”⁹⁷ “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury;”⁹⁸ and “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury”⁹⁹ Meanwhile, in the civil context, the Seventh

Portman, *supra* note 43; *Role of the Jury*, CITIZENS INFO. BOARD, <http://www.citizensinformation.ie/en/justice/courtroom/jury.html> (last updated Feb. 5, 2014).

87. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903, 1905 (2016); *Bench Trials*, *supra* note 86; *Role of the Jury*, *supra* note 86.

88. *Role of the Jury*, *supra* note 86.

89. *Id.*

90. *Id.*

91. *Id.*; *Types of Juries*, *supra* note 84.

92. *Williams*, 136 S. Ct. at 1905 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)).

93. *See id.*

94. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *United States v. McClain*, 444 F.3d 556, 561 (6th Cir. 2005); *Bench Trials*, *supra* note 86.

95. *See Williams*, 136 S. Ct. at 1905; *Chevron U.S.A Inc.*, 467 U.S. at 842; *McCain*, 444 F.3d at 561.

96. *Role of the Jury*, *supra* note 86; *see also Bench Trials*, *supra* note 86.

97. U.S. CONST. art. III §2, cl. 3.

98. U.S. CONST. amend. V.

99. U.S. CONST. amend. VI.

Amendment provides that “[i]n [s]uits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”¹⁰⁰ Thus, the right to a jury in civil cases is more limited, applying only to cases in federal courts—“[c]ourt[s] of the United States”—or to violations of federal statutes.¹⁰¹ As in the case of asymmetric disclosure—the defendant’s right against self-incrimination—the right to a jury is the norm in criminal cases, but the rare exception in civil ones.¹⁰²

There are two kinds of juries in most criminal trials: The trial is conducted in front of a *petit jury*, whereas the indictment is sought from a grand jury.¹⁰³ The baseline belief of juries in both civil and criminal matters is impartiality.¹⁰⁴ An impartial jury “has no opinion about the case at the start of the trial and . . . bases its verdict on competent legal evidence.”¹⁰⁵ Both civil and criminal trials impose a requirement that jurors be impartial.¹⁰⁶ In the case of criminal trials, this requirement arises from the Sixth Amendment,¹⁰⁷ whereas in civil trials, it derives from the Supreme Court precedent¹⁰⁸ and procedural rules.¹⁰⁹ For example, 28 U.S.C. § 1866(c) notes that a prospective juror may be “excluded by the court on the ground that such person may be unable to render impartial jury service.”¹¹⁰ Jury selection, which allows lawyers and judges to remove prospective jurors

100. U.S. CONST. amend. VII. “The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.” FED. R. CIV. P. 38(a).

101. See U.S. CONST. amend. VII; FED. R. CIV. P. 38(a).

102. U.S. CONST. amend. VII; FED. R. CIV. P. 38(a); *The Differences Between a Criminal and a Civil Case*, FINDLAW: LEARN ABOUT L., <http://criminal.findlaw.com/criminal-law-basics/the-differences-between-a-criminal-case-and-a-civil-case.html> (last visited Apr. 18, 2018).

103. See *Difference Between Grand Jury and Trial Jury*, DIFFERENCE BETWEEN: DESCRIPTIVE ANALYSIS & COMPARISONS, <http://www.differencebetween.info/difference-between-grand-jury-and-trial-jury> (last visited Apr. 18, 2018).

104. See *Role of the Jury*, *supra* note 86.

105. *Impartial Jury*, BLACK’S LAW DICTIONARY (9th ed. 2009).

106. *Role of the Jury*, *supra* note 86.

107. U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .” *Id.*

108. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). In this civil case, the Court affirmed that a “touchstone of a fair trial is an impartial trier of fact—a jury capable and willing to decide the case solely on the evidence before it.” *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

109. 28 U.S.C. § 1866(c) (2012).

110. *Id.*

either with or without cause, is meant to assist in procuring an impartial petit jury.¹¹¹

Since juries are required in most criminal cases—but not in most civil ones—and since juries must generally proffer unanimous verdicts, the effect of requiring criminal juries is to make the establishment of facts more difficult for the criminal prosecutor.¹¹² A jury that fails to establish facts either way is called a *hung jury*,¹¹³ which favors the defendant insofar as it maintains the status quo and requires the prosecutor or plaintiff to spend more if she wishes to re-litigate.¹¹⁴

Criminal defendants are also entitled to a public trial.¹¹⁵ As mentioned earlier, the right to a public trial can counter the possibility of collusion between different government organs—the police, prosecutor, and judge—that is peculiar to the criminal context.¹¹⁶ However, publicity is not necessarily an advantage.¹¹⁷ On the one hand, since the State is not only judging but also prosecuting and investigating a criminal case, the potential for improper collusion among these roles is greater than in civil cases, and the publicity of a trial—like the involvement of a lay jury—can alleviate this

111. FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24; *How Courts Work: Steps in a Trial*, A.B.A., http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect.html (last visited Apr. 18, 2018). In civil cases:

The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

FED. R. CIV. P. 47(a). In criminal cases, the process is substantially similar. FED. R. CRIM. P. 24. Removals without cause are called peremptory challenges, and are more available in criminal trials than in civil ones. FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24; *How Courts Work: Steps in a Trial*, *supra*.

112. See U.S. CONST. amend. VI; FED. R. CRIM. P. 31; *Role of the Jury*, *supra* note 86.

113. *What Happens If There Is a Hung Jury?*, FULLY INFORMED JURY ASS'N, <http://www.fija.org/document-library/jury-nullification-faq/what-happens-if-there-is-a-hung-jury/> (last visited Apr. 18, 2018).

114. See *id.* For example, Bill Cosby's trial ended in a hung jury, which cost the government \$219,000. Associated Press, *The Cosby Trial That Ended in a Hung Jury Cost \$219,000*, BUS. INSIDER (July 13, 2017, 4:24 PM), <http://www.businessinsider.com/ap-cosby-trial-cost-219k-more-than-half-paying-for-overtime-2017-7>.

115. U.S. CONST. amend. VI.

116. See FRIEDMAN, *supra* note 1, at 291; Mueller, *supra* note 20, at 5, 9; Sherilyn Streicker, *Criminal Trial Publicity*, NOLO, <http://www.nolo.com/legal-encyclopedia/criminal-trial-publicity.html> (last visited Apr. 18, 2018).

117. See Mueller, *supra* note 20, at 3, 12–13.

concern.¹¹⁸ On the other hand, publicity affords external parties the chance to influence trials, for example, by volunteering as witnesses.¹¹⁹ Thus, it is a right not only of the criminal defendant but also of the public, which may wish to contribute to the investigation.¹²⁰ A particular plaintiff may know something about an employer's discriminatory practices, but may be unaware of other persons who have far greater knowledge of the defendant's bad behavior.¹²¹ Similarly, a defendant may be unaware of a witness who saw him at another location at the time of the tried crime.¹²² A public trial increases the probability that these strangers will contribute to the case.¹²³ This apparent disadvantage for the criminal defendant can partly be explained by the theoretically lower probability of detecting crimes versus civil wrongs.¹²⁴ Since crimes are intentional, criminals are better at being able to conceal evidence of wrongdoing than accidental tortfeasors are, and publicity can counteract the effects of criminal concealment.¹²⁵ The disadvantage may also be overstated, insofar as publicity only applies at the trial stage; a stage that will never materialize if key evidence is not already known pre-trial.¹²⁶ Litigants are unlikely to proceed to trial on the bet that some key piece of evidence will emerge from parts unknown.¹²⁷ A more troubling aspect of publicity, though, is that it can also increase the

118. See *DA's, Prosecutors, Judges Continue to Feed the Police Brutality Beast*, TULLY & WEISS (Sept. 12, 2016), http://www.tully-weiss.com/blog.php?article=policy-brutality-fed-by-prosecutors-das-judges_51; Streicker, *supra* note 116.

119. See Streicker, *supra* note 116.

120. See *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (per curiam); Streicker, *supra* note 116. "The Sixth Amendment right [to a public trial] . . . is the right of the accused. The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment." *Presley*, 558 U.S. at 212 (citing *Press-Enterprise Co. v. Superior Court of Cal. for Riverside*, 464 U.S. 501, 508 (1984)).

121. See Anthony N. Luti, *The Plaintiff's Employment Case: Getting the Discovery You Need*, LUTI L. FIRM, <http://www.lutilaw.com/articles/ARTICLE%20REPRINT%20-%20Getting%20Employment%20Discovery.pdf> (last visited Apr. 18, 2018).

122. See Tim Prudente, *After 13 Years, Baltimore Man Free After New Witnesses Say He Is Innocent of 2004 Murder*, BALT. SUN (Sept. 19, 2017, 4:40 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-johnson-exonerated-20170919-story.html>; Brett Snider, *If You Witness a Crime, Do You Have to Testify?*, FINDLAW (Oct. 14, 2014, 12:37 PM), <http://blogs.findlaw.com/blotter/2014/10/if-you-witness-a-crime-do-you-have-to-testify.html>.

123. See Streicker, *supra* note 116.

124. FRIEDMAN, *supra* note 1, at 286.

125. See *id.*

126. See Mueller, *supra* note 20, at 5–6; James, *How Prosecutors Initiate Cases for Criminal Charges*, LUKE POWELL: LEGAL ADVISE BLOG (Feb. 5, 2015), <http://www.lukepowell.com/2015/02/how-prosecutors-initiate-cases-for-criminal-charges/>.

127. See Mueller, *supra* note 20, at 17; James, *supra* note 126.

likelihood of biased juries, where unfavorable media coverage poisons the minds of the public against the prosecution or defense.¹²⁸ However, jury bias and the production of new evidence will obviously make a jury lean pro-defendant or anti-defendant, and may, in the absence of skewed selection, cancel out on average.¹²⁹

Civil litigants can also appeal using First Amendment arguments supporting the access of the public court proceedings.¹³⁰ In spite of this possibility, most jurisdictions do not require public civil trials.¹³¹ This implies that civil cases are more likely to exclude information from parties that are unknown to the direct participants: Anyone who hears of a criminal case can come forward to volunteer information, but if no one hears of the civil case, then no one will come forward either.¹³²

C. *Civil Versus Criminal Judgments*

At the judgment stage, most would agree that the criminal prosecutor faces a clearly higher threshold than civil plaintiffs do.¹³³ However, even this seemingly obvious contrast appears more illusory than real.¹³⁴ In the sequel, we consider the two civil thresholds—preponderance of the evidence and clear and convincing evidence, followed by the criminal threshold of beyond a reasonable doubt.¹³⁵

First, the preponderance of the evidence standard is used to establish a defendant's liability in most civil cases.¹³⁶ It embodies a presumption that the defendant is just as likely to be liable as not, in civil cases.¹³⁷ Some

128. See Mueller, *supra* note 20, at 11–13.

129. See *id.*

130. See U.S. CONST. amend. I; NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. Cty., 980 P.2d 337, 368 (Cal. 1999).

131. See NBC Subsidiary (KNBC-TV), Inc., 980 P.2d at 364–65; 3rd Cir. — *Open Courts Compendium: Access to Civil Proceedings*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/3rd-cir-open-courts-compendium/general-1> (last visited Apr. 18, 2018).

132. See NBC Subsidiary (KNBC-TV), Inc., 980 P.2d at 364–65; Mueller, *supra* note 20, at 12–13; Streicker, *supra* note 116.

133. See Geoffrey G. Nathan, *Preponderance of Evidence vs Reasonable Doubt*, FEDERALCHARGES.COM, <http://www.federalcharges.com/preponderance-evidence-vs-reasonable-doubt/> (last visited Apr. 18, 2018).

134. See *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

135. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1294 (1982); Nathan, *supra* note 133.

136. *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

137. See *Herman v. Huddleston*, 459 U.S. 375, 390 (1983). “[P]reponderance-of-the-evidence standard allows both parties to ‘share the risk of error in roughly equal

writers have expressed it as an objective probabilistic threshold, either in terms of absolute probability¹³⁸—for example, probability of liability greater than 0.5—or in terms of relative odds—for example, odds in favor greater than one to one.¹³⁹ Others have suggested a subjective interpretation, based on the cumulative effect of the evidence on the fact finder.¹⁴⁰

Second, proving liability by clear and convincing evidence requires either at least the same probability of liability as in the preponderance—but with more precision—or a higher probability of liability than preponderance with at least the same precision.¹⁴¹ By precision, we mean the reciprocal of the variance, or the lack of variance, in an estimate.¹⁴² For example, suppose that Jury A thinks the defendant is liable with a probability uniformly distributed between 0.3 and 0.8, whereas Jury B thinks that she is liable with probability uniformly distributed between 0.5 and 0.6.¹⁴³ Both juries expect that the defendant is liable with probability 0.55, the average, but Jury B's expectation is more precise because its estimate varies over a smaller range.¹⁴⁴ In this case, Jury B's verdict may meet the clear and convincing threshold while Jury A's verdict may not, even though both expect the same probability of liability.¹⁴⁵ Alternatively, the clear and convincing standard may be interpreted to mean a higher probability than 0.5, or one-to-one odds, as in the case of preponderance, or even a combination of the two.¹⁴⁶ Cases

fashion.' Any other standard expresses a preference for one side's interests." *Id.* (citation omitted) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1978)).

138. Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 *YALE L.J.* 1254, 1274 (2013).

A requirement that more than 50% of the evidence points to something. This is the burden of proof in a civil trial. For example, [a]t the end of civil case A v. B, 51% of the evidence favors A; [t]hus, A has a preponderance of the evidence, A has met their burden of proof, and A will win the case.

Civil Suit: Travis Family Goes After Arias \$\$\$, CNN: HLN, <http://www.hlnv.com/article/2013/05/09/civil-suit-travis-family-goes-after-arias/> (May 9, 2013, 5:43 PM).

139. See Cheng, *supra* note 138, at 1259, 1268.

140. See *id.* at 1266–68.

141. See *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

"Preponderance of the evidence 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, *not necessarily in number of witnesses or quantity*, but in its effect on those to whom it is addressed.'" *Glage v. Hawes Firearms Co.*, 276 Cal. Rptr. 430, 435 (Cal. Ct. App. 1990) (quoting *People v. Miller*, 171 Cal. 649, 652 (Cal. 1916)).

142. See Cheng, *supra* note 138, at 1259–60, 1268.

143. See *id.*

144. See *id.* at 1268.

145. See *id.*; *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

146. See Cheng, *supra* note 138, at 1259, 1267–68; *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

do not seem to recommend one interpretation over the others.¹⁴⁷ Nevertheless, this standard is used to overcome a strong presumption—typically when either an important but non-constitutional individual interest¹⁴⁸ or a clear public policy is challenged.¹⁴⁹ Some cases suggest that it is employed to establish, or avoid, civil liability that is penal in nature.¹⁵⁰ For example, courts have used this standard to determine whether a parent’s rights should be terminated because of an irremediable pattern of domestic abuse.¹⁵¹ This is an intermediate standard between the default civil and criminal standards considered immediately above and below.¹⁵² Formally, we can say only that this standard is higher than preponderance, but not much beyond that.¹⁵³ In applying the clear and convincing evidence standard to actions challenging the validity of a patent, the Supreme Court merely

147. See Cheng, *supra* note 138, at 1258.

148. See *Weiner v. Fleischman*, 816 P.2d 892, 898 (Cal. 1991). “Proof by clear and convincing evidence is required ‘where particularly important individual interests or rights are at stake,’ such as the termination of parental rights, involuntary commitment, and deportation.” *Id.* (quoting *Herman v. Huddleston*, 459 U.S. 375, 389 (1983)). “However, ‘imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.’” *Id.* (quoting *Herman*, 459 U.S. at 389–90).

149. See *Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. 91, 95, 112–13 (2011) (requiring an alleged patent infringer to prove an affirmative defense that the controlling patent was invalid by clear and convincing evidence).

150. See 15 U.S.C. § 2087(b)(2)(B)(iv) (2012). “Relief may not be ordered [against an employer taking a personnel action against a whistleblowing employee] if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [whistleblowing] behavior.” *Id.*; *Ferris v. Turlington*, 510 So. 2d 292, 294 (Fla. 1987) (requiring clear and convincing evidence to revoke a teacher’s license).

151. See *In re E.M.*, 4 N.E.3d 636, 640, 642 (Ind. 2014).

152. See *Addington v. Texas*, 441 U.S. 418, 432–33 (1979). In discussing civil commitment proceedings, the Court reasoned:

We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term *unequivocal* is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of *clear, unequivocal and convincing* evidence in appellant’s commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the *clear and convincing* standard which we hold is required to meet due process guarantees is a matter of state law

Id.; *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

153. See *Weiner*, 816 P.2d at 896; *Evidentiary Standards and Burden of Proof*, *supra* note 43.

noted that this standard was appropriate because “a preponderance standard of proof was too *dubious* a basis to deem a [presumptively valid] patent invalid.”¹⁵⁴

Finally, the beyond a reasonable doubt standard is used to establish a defendant’s guilt in a criminal case.¹⁵⁵ The general impression is that this standard is much higher than the civil ones and provides the starkest advantage to the criminal defendant over a civil one.¹⁵⁶ Indeed, the Supreme Court has said that “a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”¹⁵⁷ But this impression may also be wrong.¹⁵⁸ The beyond a reasonable doubt standard has caused much confusion and has even been abandoned in some jurisdictions.¹⁵⁹ Surveyed judges have generally equated the standard with a probability of guilt higher than 90%.¹⁶⁰ Meanwhile, potential jurors, who actually apply the standard, appear to almost equate it with a preponderance of the evidence.¹⁶¹

154. *Microsoft Corp.*, 564 U.S. at 102.

155. *In re Winship*, 397 U.S. 358, 361 (1970).

156. *Id.* at 367. In a criminal case, the evidence upon which the jury are justified in finding a verdict of guilty must be sufficient to satisfy them of the prisoner’s guilt beyond a reasonable doubt. *Id.* at 361.

157. *Id.* at 363 (quoting *W. v. Family Court*, 247 N.E.2d 253, 259 (N.Y. 1969), *rev’d*, *In re Winship*, 397 U.S. at 358).

158. See LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 31 (2006).

159. *Id.* at 32.

England, which has the same common law tradition as our own, has recently abandoned its two-hundred-year-old practice of having judges instruct jurors about the nature of reasonable doubt. Instead, jurors there are simply told that conviction requires that they must be *sure* of the guilt of the accused. England made this change because senior legal theorists concluded that reasonable doubt could be neither defined, nor uniformly understood, nor consistently applied.

Id. “[T]his notion of proof is grievously inadequate, deliberately unclear, wholly subjective, and open to about as many interpretations as there are judges, to whom it falls to explain this notion to hapless jurors.” *Id.* at 30.

160. Walen, *supra* note 40, at 374.

In one study of federal judges throughout the United States, nearly three quarters of the 171 who responded to the poll picked a probability that was 90% or higher; and in a second study, this one of Illinois state judges, the mean probability was 89%, with 63% of the judges picking a level of 90% or higher.

Id. (citing Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 126 (1999)).

161. See Walen, *supra* note 40, at 374–76 (providing a literature review of tests showing that potential jurors consider the beyond a reasonable doubt standard as a low standard). For example:

In one study, Robert MacCoun and Norbert Kerr constructed a trial transcript that was as equivocal as possible. The authors gave the transcript to mock juries composed of four students. Half of the juries received a reasonable

Perhaps more interesting than the exact thresholds in these cases is the fact that all three are conditional.¹⁶² In particular, they are conditioned on the quality of the procedures used beforehand.¹⁶³ Even if the criminal threshold was higher than the civil one at the judgment stage, conditional on both procedures being equally protective—and we have shown that it may not be—it may well be a lower threshold unconditionally.¹⁶⁴ Criminal investigators already have advantages at the pre-trial stage, so higher trial thresholds may not reverse the prior pro-prosecutor imbalances.¹⁶⁵

D. *Expedition and Finality*

Both criminal and civil cases operate under time constraints.¹⁶⁶ These effectively limit the amount of information that the parties can acquire or present.¹⁶⁷ A prosecutor may be unable to persuade witnesses to speak in a limited time frame; however, more time might have allowed her to convince them.¹⁶⁸ Under the Constitution, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”¹⁶⁹ This right is elucidated in the Speedy Trial Act of 1974,¹⁷⁰ which now requires that, absent an enumerated exception, criminal trials must commence within seventy days of

doubt instruction, and the other half received a preponderance of the evidence instruction. Only 36% of the latter juries found the defendant guilty, implying that the case was weak. On that basis, one would hope that none of the juries given a reasonable doubt instruction would find the mock defendant guilty. Instead, 21% of those juries found the defendant guilty. This shows that a substantial number of jurors interpreted the [beyond a reasonable doubt] instruction to allow conviction on weak evidence, evidence that would not even satisfy the preponderance of the evidence standard for more than half of the juries that considered it.

Id. at 374–75 (footnotes omitted).

162. See Cheng, *supra* note 138, at 1259; Solan, *supra* note 160, at 114, 117; *Evidentiary Standards and Burden of Proof*, *supra* note 43.

163. See FED. R. CIV. P. 12; FED. R. CRIM. P. 12; *Evidentiary Standards and Burden of Proof*, *supra* note 43.

164. See Cheng, *supra* note 138, at 1259; Walen, *supra* note 40, at 370.

165. See Posner, *supra* note 5, at 1505.

166. 18 U.S.C. § 3161 (a)–(b) (2012); NAT’L CTR. FOR VICTIMS OF CRIME, *supra* note 10, at 9.

167. See 18 U.S.C. § 3161; COOTER & ULEN, *supra* note 2, at 269; Gershowitz & Killinger, *supra* note 27, at 264–65; Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 764–66 (1996).

168. See Gershowitz & Killinger, *supra* note 27, at 264–65; Snider, *supra* note 122.

169. U.S. CONST. amend. VI.

170. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified at 18 U.S.C. §§ 3161–3174 (1975)); see also U.S. CONST. amend. VI.

the indictment or first information.¹⁷¹ Civil defendants can appeal instead to statutory rules such as the Federal Rules of Civil Procedure, which require that they be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁷² The requirements of speed and expedition mean that while many non-legal decisions can be deliberated upon almost indefinitely, legal judgments have a limited window for deliberations and the presentation of information.¹⁷³ The costs of delayed decisions can overwhelm both the litigants and the judicial system.¹⁷⁴

The speedy trial may be more advantageous to the criminal defendant than the civil one because of the difference in their adversaries’ caseloads.¹⁷⁵ Prosecutors tend to have many more cases to try than civil plaintiffs in a given timeframe, and time constraints can amplify this difference.¹⁷⁶ If the prosecutor is asked to conclude ten cases in the time it takes a civil plaintiff to conclude just one, then the quality of the prosecutor’s work will suffer, and this may inure to the criminal defendant’s benefit.¹⁷⁷ The reason for using the qualifier *may* instead of *will* is that a prosecutor under time constraints can also make the defendant’s life difficult by failing to spot weaknesses in her own case or by offering plea deals that she might have, if she had more time to consider her options.¹⁷⁸ Insofar as a hurried prosecutor can err in ways that both help and hurt the defendant, it is difficult to ascertain whether the speedy criminal trial truly leaves the defendant in a better position.¹⁷⁹

Another limitation is on re-trying a case that has been concluded.¹⁸⁰ In a criminal case, the Constitution commands that “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”¹⁸¹

171. 18 U.S.C. § 3161(c)(1). Before being amended in 1979, the Speedy Trial Act of 1974 originally called for criminal trials to start “within sixty days from arraignment on the information or indictment.” 88 Stat. at 2077.

172. FED. R. CIV. P. 1.

173. See 18 U.S.C. § 3161(c)(1); Israel, *supra* note 167, at 765.

174. See Gershowitz & Killinger, *supra* note 27, at 262–64; Israel, *supra* note 167, at 761–62.

175. See U.S. CONST. amend. VI; Gershowitz & Killinger, *supra* note 27, at 262–63; Israel, *supra* note 167, at 761–62.

176. See Gershowitz & Killinger, *supra* note 27, at 262–65; Israel, *supra* note 167, at 761–62.

177. See Gershowitz & Killinger, *supra* note 27, at 262–64; Israel, *supra* note 167, at 761–62.

178. See Gershowitz & Killinger, *supra* note 27, at 263–64 (emphasis added).

179. See U.S. CONST. amend. VI; Gershowitz & Killinger, *supra* note 27, at 263; Israel, *supra* note 167, at 766.

180. See U.S. CONST. amend. V.

181. *Id.*

The rough analogue in civil cases are the doctrines of claim preclusion, or res judicata,¹⁸² and issue preclusion, or collateral estoppel.¹⁸³ The Supreme Court explains that under claim preclusion, “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”¹⁸⁴ Whereas under issue preclusion, “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”¹⁸⁵

Finality operates as a protection for the defendant against an identical claim or issue being relitigated in the future.¹⁸⁶ This protection is arguably stronger in the criminal case than in the civil one for two reasons: (1) The Supreme Court has apparently subsumed the civil res judicata and collateral estoppel protections of civil law into the Fifth Amendment’s Double Jeopardy clause, thereby elevating a common law protection in civil cases into a constitutional protection in criminal cases; and (2) The Supreme Court has suggested that the constitutional Double Jeopardy provision may have application beyond res judicata and collateral estoppel as well.¹⁸⁷

However, the greater protection of criminal defendants through the finality of judgments is easily overstated.¹⁸⁸ In particular, the Supreme Court has allowed the prosecutor to relitigate issues that a civil plaintiff would be estopped from revisiting.¹⁸⁹ In *Standefer v. United States*,¹⁹⁰ the Court reasoned that a prosecutor was not estopped from relitigating an issue against an aider and abettor in a criminal case, even though the principal that the defendant had allegedly aided had been acquitted of the offense.¹⁹¹ In reaching this conclusion, the Court drew three distinctions between a civil plaintiff and a prosecutor to justify this result: (1) the prosecutor had

182. *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989).

183. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

184. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

185. *Id.*

186. *See Ashe*, 397 U.S. at 443.

187. *See* U.S. CONST. amend. V; *Ashe*, 397 U.S. at 443, 445–46.

The ultimate question to be determined, then, . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace it surely protects a man who has been acquitted from having to *run the gantlet* a second time.

Ashe, 397 U.S. at 445–46 (footnote omitted) (citations omitted) (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)).

188. *See Standefer v. United States*, 447 U.S. 10, 22–24 (1980).

189. *See id.* at 25–26.

190. 447 U.S. 10 (1980).

191. *Id.* at 22 n.16, 25–26.

procedural limitations that were inapplicable to civil plaintiffs, such as—supposedly—more limited discovery, the unavailability of judgment notwithstanding the verdict, and limited or no appeal from an adverse judgment; (2) the prosecutor’s ability to introduce evidence was more limited than a civil plaintiff’s because of the exclusionary rule and similar devices; and (3) the state had a special interest in the enforcement of criminal laws.¹⁹²

The most meaningful advantage of finality for the criminal defendant does not lie in Double Jeopardy protection—which is arguably balanced by lower collateral estoppel and res judicata protections—but in an asymmetric right of appeal.¹⁹³ Both criminal and civil defendants can appeal against defective adverse judgments.¹⁹⁴ In most civil cases, other than small claims, the plaintiff has a right to appeal an adverse judgment for good cause; however, in criminal cases, the prosecutor has virtually no right of appeal.¹⁹⁵ Thus, errors in favor of the civil defendant are likelier to be rectified than errors in favor of the criminal defendant.¹⁹⁶

III. THE ADVANTAGES OF CIVIL DEFENDANTS OVER CRIMINAL ONES

A. *Case by Case Civil Protections Versus Enumerated Criminal Protections*

Criminal and civil cases differ as to various procedural limitations that control whether, and how, litigants can collect information, present the information they have, or challenge the information of the other side.¹⁹⁷ Limitations on the gathering and use of information create two expectations.¹⁹⁸ First, we expect prospective litigants—who have access to greater information—to have stronger beliefs about the matters involved.¹⁹⁹ Second, we expect the fact finder’s beliefs to be closer to the beliefs of the

192. *Id.* at 22–25.

193. *See* *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Standefer*, 447 U.S. at 22–23, 22 n.16, 25.

194. *See Standefer*, 447 U.S. at 22–23.

195. *See id.* at 23; William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 496 (1993). In limited circumstances, the prosecutor can appeal a sentence, though she cannot appeal a verdict. McAninch, *supra*, at 496. An example of appealing a sentence would be where the court’s sentence was above or below the sentencing limits set by a statute. FED. R. CRIM. P. 32(j)(1)(B); *see also* McAninch, *supra*, at 496.

196. *See Standefer*, 447 U.S. at 22–23.

197. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 88–89, 92 (2008).

198. *See id.* at 91–93, 134–36; Summers, *supra* note 53, at 499–500.

199. *See* Rosen-Zvi & Fisher, *supra* note 197, at 91; Summers, *supra* note 53, at 499–500.

litigant, who has greater information or opportunity to present her case.²⁰⁰ The litigants' and fact finders' tendencies are reasonably predictable in the criminal context, but vary case by case in civil litigation.²⁰¹ Under the Fifth Amendment, a person may "no[t] be deprived of life, liberty, or property, without due process of law."²⁰² Due process has been bifurcated into substantive due process, which covers certain rights that any party must have in any due process; and procedural due process, which covers the actions adjudicators, litigants, or connected parties must take, or refrain from, in particular cases.²⁰³ Due process applies to both civil and criminal matters.²⁰⁴ However, courts have interpreted it differently in these two contexts.²⁰⁵ In civil matters, the court applies the three-part test from *Mathews v. Eldridge*²⁰⁶ to determine what due process requires in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁰⁷

The *Mathews* test is essentially an adaptation of Judge Learned Hand's test for negligence²⁰⁸ to the constitutional due process context: If *B* is the burden to the government of marginally greater procedural protections, *P* is the probability that the defendant's interest is erroneously infringed, and *L* is the magnitude of that interest—net of any countervailing benefit to the state—then the state should provide greater due process protection if $B < PL$.²⁰⁹ In practice, courts have used the Due Process Clause to extend

200. See Rosen-Zvi & Fisher, *supra* note 197, at 91; Summers, *supra* note 53, at 499–500.

201. See Rosen-Zvi & Fisher, *supra* note 197, at 92–93.

202. U.S. CONST. amend. V.

203. United States v. Salerno, 481 U.S. 739, 746 (1987).

204. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 6–7 (2006).

205. See *id.*

206. 424 U.S. 319 (1976).

207. *Id.* at 335.

208. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); *Mathews*, 424 U.S. at 335.

209. See *Mathews*, 424 U.S. at 335; *Carroll Towing Co.*, 159 F.2d at 173.

some of the rights that the Constitution only provides for criminal trials to civil trials.²¹⁰

On the other hand, in the criminal context, the court has held that “[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”²¹¹ While important enumerated protections apply to only criminal cases, the *Mathews* test allows for these and potentially further protections for the civil defendant on a case by case basis.²¹² In particular, while civil protections may apply at any stage—trial or pre-trial—most of the criminal protections apply only at the trial or post-trial stage.²¹³ A surprising consequence of this distinction is that “criminal defendants constitutionally may be arrested, detained, and suspended from government employment before trial with less meaningful hearing rights than comparable deprivations would require in civil litigation.”²¹⁴ Given that most cases—criminal or civil—never proceed to trial at all, the implication is that in practice, criminal defendants may have fewer protections than civil ones.²¹⁵ In the pre-trial stages of a criminal versus a civil case, the fact finder’s beliefs are likely to be closer to the prosecution’s than the defendant’s, since the criminal defendant’s due process rights are more limited.²¹⁶

The following sketch depicts the comparison of information gathering in the civil and criminal processes.²¹⁷

210. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). An example is the right to confront adverse witnesses, discussed below. *Id.*; see also *infra* Section III.D.

211. *Medina v. California*, 505 U.S. 437, 443 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)) (alteration in original).

212. *Medina*, 505 U.S. at 443–44; *Mathews*, 424 U.S. at 335.

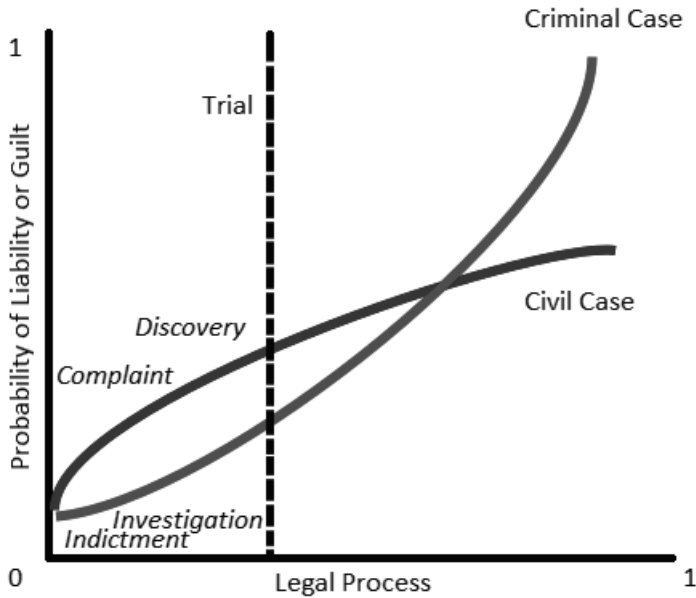
213. Kuckes, *supra* note 204, at 4–5, 39.

214. *Id.* at 3–4, 39.

215. See *id.* at 3–5, 39; Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, A.B.A. SEC. LITIG., Winter 2004, at 1, 2–3.

216. See Kuckes, *supra* note 204, at 3–4, 22–25, 39.

217. See COOTER & ULEN, *supra* note 2, at 393; Kuckes, *supra* note 204, at 4–5, 7; Peter Lewisch, 7700: *Criminal Procedure*, in 5 ENCYCLOPEDIA L. & ECON.: ECON. CRIME & LITIG. 241, 253 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).



At the early stages of the civil process, the plaintiff must meet relatively high thresholds to continue the investigation, whereas the criminal prosecutor faces lower limits.²¹⁸ At the trial stage, the criminal prosecutor faces higher thresholds than the civil plaintiff, notably because of the defendant’s enhanced protections, evidence vetting, a higher burden of proof, and the lopsided opportunity to appeal.²¹⁹ The preceding section has shown how many of these protections for criminal defendants have either been whittled down or replicated in the civil case, thus making the civil-criminal contrast weaker.²²⁰ In the sequel, we consider how civil protections at some stages have been increased to levels not seen in the criminal context.²²¹

218. See FED. R. CIV. P. 8; David S. Evans, *What You Need to Know About Twombly: The Use and Misuse of Economic and Statistical Evidence in Pleadings*, GCP, July 2009, at 1, 2, http://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/EVANS-JULY-09_2_.pdf; *Evidentiary Standards and Burdens of Proof*, *supra* note 43. “Differences stem from the more restrictive use of *suspect* evidence in criminal cases—as embodied in the respective constitutional rights/amendments—which, albeit only partially, can be explained on grounds of the increased costliness of type one errors in criminal than in civil cases.” Lewisch, *supra* note 217, at 253.

219. See U.S. CONST. amends. V, VI; Lewisch, *supra* note 217, at 253, 255; Nathan, *supra* note 133.

220. See Kuckes, *supra* note 204, at 34, 38; *supra* Part III.

221. See *infra* Part IV.

B. *The Civil Complaint Versus the Criminal Indictment*

To commence the formal legal process, the civil plaintiff files a complaint, whereas the criminal prosecutor typically seeks an indictment.²²² The standard for the civil complaint is plausible evidence,²²³ and in the case of securities fraud litigation, strong inference;²²⁴ whereas the standard for a criminal indictment is probable cause.²²⁵ A comparison of these standards will highlight the difference between civil and criminal thresholds.²²⁶

The *Bell Atlantic Corp. v. Twombly*²²⁷ and *Ashcroft v. Iqbal*²²⁸ cases established the plausible evidence standard to discourage meritless complaints and avoid wasteful discovery costs in civil cases.²²⁹ This standard is notably higher than the notice pleading regime that preceded it.²³⁰ The Third Circuit applies the plausible evidence standard as a three part test:

222. FED. R. CIV. P. 3; FED. R. CRIM. P. 7.

223. David S. Evans, *What You Need to Know About Twombly: The Use and Misuse of Economic and Statistical Evidence in Pleadings*, GCP, July 2009, at 1, 3–4, [http://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/EVANS-JULY-09_2 .pdf](http://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/EVANS-JULY-09_2.pdf); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (Stevens, J., dissenting). The *Twombly* Court instead explained that Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include facts—as distinct from legal *labels and conclusions*—giving rise to a plausible, rather than merely *conceivable*, entitlement to relief. *Twombly*, 550 U.S. at 555, 570. Two years later in *Iqbal*, the Court confirmed that *Twombly* applies to all civil suits, not just antitrust cases or complex cases. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

224. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). The majority held that plaintiffs must demonstrate a cogent *inference of scienter* at least as strong as any opposing inference from the defendant. *Id.*

225. *Id.* at 336. Probable cause is a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant. U.S. CONST. amend. IV. Probable cause exists when there is a fair probability that a search will result in evidence of a crime being discovered. See *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

226. Evans, *supra* note 223, at 4; *Gates*, 462 U.S. at 230–31; *Tellabs, Inc.*, 551 U.S. at 314.

227. 550 U.S. 544 (2007).

228. 556 U.S. 662 (2009).

229. See *Twombly*, 550 U.S. at 559.

[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment]. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.

Id.

230. See *Conley v. Gibson*, 355 U.S. 41, 45–47 (1957). “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45–46.

(1) check that the plaintiff has pled every element of the claim; (2) check that the plaintiff's allegations in support of each element are not merely conclusions—for example, this element is met—but statements of fact from which conclusions may be inferred—for example, if these facts are true then this element is likely met; and (3) assuming that non-conclusory allegations are true, decide whether they plausibly entitle the plaintiff to relief.²³¹ This test does clarify that every element of the claim must be supported by factual allegations from which the element may be inferred.²³² However, it does not tell us how strong that inference needs to be.²³³ Judge Posner explained the plausibility standard in *Atkins v. City of Chicago*²³⁴ as follows: “the complaint taken as a whole must establish a non-negligible probability that the claim is valid, though it need not be so great a probability as such terms as *preponderance of the evidence* connote.”²³⁵ This probabilistic view is perhaps at odds with *Iqbal*'s language that “[t]he plausibility standard is not akin to a *probability requirement*.”²³⁶ However, it is difficult to understand the standard in a non-probabilistic way; moreover, a probabilistic view, even if imperfect, helps us usefully compare thresholds such as plausible evidence and preponderance.²³⁷

In securities fraud litigation, the higher strong inference standard is used to sift strong complaints from weaker ones.²³⁸ The policy concern is similar to that for the plausible evidence standard: that “[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct

231. *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016).

Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must take three steps. First, it must “take note of the elements the plaintiff must plead to state a claim.” Second, it should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” Finally, “when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

Id. (quoting *Iqbal*, 556 U.S. at 675, 679) (footnote omitted) (citations omitted).

232. *See id.*

233. *See id.*

234. 631 F.3d 823 (7th Cir. 2011).

235. *Id.* at 832.

236. *Iqbal*, 556 U.S. at 678; *Atkins*, 631 F.3d at 832.

237. *Atkins*, 631 F.3d at 831.

238. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313–14, 324 (2007). Securities fraud complaints are typically brought under section 10(b) of the Securities Exchange Act of 1934 and under U.S. Securities and Exchange Commission (“SEC”) rule 10b-5. *See Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, sec. 376, § 10B, 124 Stat. 1376, 1778 (codified as amended at 15 U.S.C. 78j-2 (2010)); 17 C.F.R. § 240.10b-5 (2017).

conforms to the law.”²³⁹ The Private Securities Litigation Reform Act (“PSLRA”) requires that “the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”²⁴⁰ However, even though the concerns are similar, the threshold for strong inference is explicitly higher than plausible evidence.²⁴¹ As the Supreme Court explained:

An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant’s conduct. To qualify as *strong*, . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.²⁴²

Compare the criminal process, where the grand jury which decides on indictment, can be impaneled on mere suspicion.²⁴³ The Supreme Court has explained that:

“Unlike a court, whose jurisdiction is predicated upon a specific case or controversy, the grand jury ‘can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.’” It need not identify the offender it suspects, or even “the precise nature of the offense” it is investigating. The grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge.²⁴⁴

Thus, while the civil complaint at least requires a claim pleaded with particularity—for example, stating the elements of a claim and alleging some evidence for each element—the prosecutor in a criminal case can impanel a grand jury merely on suspicion of some unknown wrongdoing.²⁴⁵ Suspicion is “[t]he apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly even no

239. *Tellabs, Inc.*, 551 U.S. at 313.

240. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, sec. 101(b), § 21D, 109 Stat. 737, 747 (codified as amended at 15 U.S.C. § 78u-4).

241. *Tellabs, Inc.*, 551 U.S. at 314.

242. *Id.*

243. *United States v. Williams*, 504 U.S. 36, 48 (1992).

244. *Id.* (citations omitted) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991); *Blair v. United States*, 250 U.S. 273, 282 (1919)).

245. *Tellabs, Inc.*, 551 U.S. at 314; *Williams*, 504 U.S. at 48.

evidence.”²⁴⁶ This is an explicitly lower threshold than the plausible evidence required for a civil claim, even though it triggers the substantial social cost of impaneling a grand jury.²⁴⁷

Next, in order to return an indictment, the grand jury must find probable cause for further process.²⁴⁸ This standard was most recently scrutinized when the Supreme Court of the United States held that a finding of probable cause by a lay grand jury was sufficient to justify the forfeiture of a suspect’s property, even when such forfeiture would limit the suspect’s ability to hire a defense attorney.²⁴⁹ The Supreme Court characterizes probable cause as a threshold lying between mere suspicion and prima facie evidence: “[t]he term *probable cause* . . . imports a seizure made under circumstances which warrant suspicion. . . . [I]t is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.’”²⁵⁰ Similarly, the Sixth Circuit characterizes probable cause “as reasonable grounds for belief, supported by less than prima facie proof, but more than mere suspicion.”²⁵¹ Since suspicion is warranted even without any evidence, arguably any scintilla of evidence at all could potentially suffice for a finding of probable cause, which would secure an indictment and trigger further social costs.²⁵²

C. *Civil Discovery Versus Criminal Search and Seizure*

In the civil context, the scope of discovery is governed by the Federal Rules of Civil Procedure, which state:

Unless otherwise limited by court order, the scope of discovery is as follows: [p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this

246. *Suspicion*, BLACK’S LAW DICTIONARY (9th ed. 2009).

247. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Williams*, 504 U.S. at 47–48.

248. *Kaley v. United States*, 134 S. Ct. 1090, 1097 (2014).

249. *See id.* at 1095–97, 1105.

250. *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *Locke v. United States*, 7 U.S. 339, 348 (1813); *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

251. *United States v. McClain*, 444 F.3d 556, 562 (6th Cir. 2005) (quoting *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993)).

252. *See id.* at 569.

scope of discovery need not be admissible in evidence to be discoverable.²⁵³

In the criminal context, searches and seizures are governed by three successively weaker standards:²⁵⁴ Probable cause—familiar from the grand jury indictment discussed above,²⁵⁵ reasonable suspicion,²⁵⁶ and reasonable belief.²⁵⁷

Probable cause at criminal law is “[a] reasonable ground to suspect that a person has committed or is committing a crime, or that a place contains specific items connected with a crime.”²⁵⁸ It is the evidentiary standard that the police must meet to obtain a warrant for an arrest or to execute a search of a person or property.²⁵⁹ The Court has explained that this standard requires case-by-case balancing:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search

253. FED. R. CIV. P. 26(b)(1).

254. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 336 (2007) (Stevens, J., dissenting); *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Terry v. Ohio*, 392 U.S. 1, 28 (1968). “When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.” *United States v. Knights*, 534 U.S. 112, 121 (2001).

255. *Tellabs, Inc.*, 551 U.S. at 336 (Stevens, J., dissenting); see also discussion *supra* Section III.B.

The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and that the belief of guilt must be particularized with respect to the person to be searched or seized.

Maryland v. Pringle, 540 U.S. 366, 371 (2003) (alteration in original) (citation omitted). Probable cause “exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *Ornelas*, 517 U.S. at 696 (citing *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)).

256. *Ornelas*, 517 U.S. at 696. Reasonable suspicion is a standard, more than a hunch but considerably below preponderance of the evidence, which justifies an officer’s investigative stop of an individual upon the articulable and particularized belief that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000).

257. *Terry*, 392 U.S. at 28. Reasonableness is that point at which the government’s interest advanced by a particular search or seizure outweighs the loss of individual privacy or freedom of movement that attends the government’s action. *Illinois v. Lidster*, 540 U.S. 419, 426–27 (2004).

258. *Probable Cause*, BLACK LAW’S DICTIONARY (9th ed. 2009).

259. See *id.*

against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.²⁶⁰

Both the civil proportionality standard and the probable cause criminal standard are determined case-by-case.²⁶¹ In each context, just as important as the balancing requirement, is the institutional requirement that a judge, rather than a plaintiff or police officer, conduct the balancing inquiry: “[probable cause] protection consists in requiring that [necessary] inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”²⁶² These similarities suggest that discovery and criminal search and seizure, face similar thresholds.²⁶³ However, note that the factors that explicitly require balancing in the civil case are more extensive and explicit than in the criminal one.²⁶⁴ In particular, the proportionality language in the civil discovery context can require estimates for costs and benefits of a particular discovery that are absent in the criminal context.²⁶⁵ This, and other enumerated factors, suggest that the civil discovery threshold may be harder to meet than criminal probable cause standard.²⁶⁶

The other two search standards in the criminal context are even lower.²⁶⁷ The second standard that applies to criminal investigations is “reasonable suspicion, [which is a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.”²⁶⁸ It is the standard that a police officer must meet to briefly detain, but not arrest, someone who is suspected of involvement in a crime, or to frisk a person—the so-called Terry stop.²⁶⁹ The Supreme Court explained the threshold as follows:

While *reasonable suspicion* is a less demanding standard than probable cause and requires a showing considerably less than

260. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1526 (2012) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

261. See FED. R. CIV. P. 26(b)(1), (2)(A); *Bell*, 441 U.S. at 559.

262. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

263. See FED. R. CIV. P. 26(b)(1); *Florence*, 132 S. Ct. at 1526; *Johnson*, 333 U.S. at 14.

264. See FED. R. CIV. P. 26(b)(1); *Florence*, 132 S. Ct. at 1526.

265. See FED. R. CIV. P. 26(b)(1); *Florence*, 132 S. Ct. at 1526.

266. See FED. R. CIV. P. 26(b)(1); *Probable Cause*, *supra* note 258.

267. See *Evidentiary Standards and Burdens of Proof*, *supra* note 43.

268. *Reasonable Suspicion*, BLACK’S LAW DICTIONARY (9th ed. 2009).

269. *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968); see also *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000).

preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an “inchoate and unparticularized suspicion or *hunch*” of criminal activity.²⁷⁰

Thirdly, the reasonable belief standard applies when officers are searching premises that they do not have clear authority—typically given by a warrant pursuant to probable cause—to search.²⁷¹ Police officers are immune from suit so long as they search a location with the *reasonable belief* that a suspect, or inculpatory material, will be found there.²⁷² The Supreme Court has held that this standard provides qualified immunity to “all but the plainly incompetent or those who knowingly violate the law.”²⁷³ A year later, the Court held that to overcome qualified immunity for an official who has allegedly violated a right, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²⁷⁴ At the circuit level, the Second Circuit has held that the reasonable belief standard is lower than probable cause.²⁷⁵ The Tenth Circuit has held the same.²⁷⁶

270. *Wardlow*, 528 U.S. at 123–24 (citation omitted) (quoting *Terry*, 392 U.S. at 27).

271. *Griffin v. Wisconsin*, 483 U.S. 868, 870–71, 880 (1987) (upholding warrantless search of probationer’s house by probation officer on basis of *reasonable grounds*).

272. *United States v. Lauter*, 57 F.3d 212, 214 (2d Cir. 1995); *Griffin*, 483 U.S. at 870–71.

273. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

274. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

275. *See Lauter*, 57 F.3d at 215.

Although we agree with the district court’s ultimate conclusion, we note that it applied too stringent a test when it held that “officers may properly determine whether they have *probable cause* to believe that an apartment or house is the arrestee’s residence, and if probable cause exists, they may enter such premises to effect the arrest when they have a reasonable basis to believe that the arrestee will be present.” As noted above, the proper inquiry is whether there is a *reasonable belief* that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present.

Id. (citations omitted).

276. *See Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1990).

Only one circuit has suggested a higher knowledge standard [than reasonable belief] on the part of law enforcement officers [entering a third party’s residence to arrest a suspect]. In *United States v. Harper*, the Ninth Circuit concluded that “the police may enter a home with an arrest warrant only if they have probable cause to believe the person named in the warrant resides there.”

Id. at 1224 (citation omitted) (quoting *United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991)).

D. *Adversarial Process and Legal Representation*

Although both criminal and civil litigants have rights to direct and cross-examination, the government backed prosecutor has certain advantages—in both experience and resources—that a private plaintiff may lack.²⁷⁷ As mentioned earlier, private civil litigants have to pay their own way, and insofar as the plaintiff must make her case before the defendant responds, the plaintiff has to pay first; if the plaintiff does not have the legal expertise to make a prima facie case, then the case is dismissed.²⁷⁸ This pay-to-play dynamic also provides a criminal prosecutor a potential advantage over the civil plaintiff, as explained below.²⁷⁹

When private information is revealed through investigation, discovery, or trial, the adversarial system provides for contentious vetting.²⁸⁰ Through confrontation and cross-examination, each side attempts to minimize the weight of adverse evidence.²⁸¹ Both civil and criminal litigants have the opportunity to challenge information adduced by the other side.²⁸² A criminal defendant has a constitutional right “to be confronted with the witnesses against him.”²⁸³ Although this right is not universal in civil proceedings, the Supreme Court has held that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”²⁸⁴

In theory then, civil litigants are at a disadvantage to criminal ones in persuading the judge on legal issues.²⁸⁵ The prosecutor has a budget and a team of experienced attorneys to pursue any case, and the criminal defendant must “have the Assistance of Counsel for his defen[s]e.”²⁸⁶ There is no analogue for this right in civil cases.²⁸⁷ There has been support for extending the right to counsel to at least some civil cases.²⁸⁸ For example, an American Bar Association resolution calls for extending the right to “low income

277. Posner, *supra* note 5, at 1505; *see also* U.S. CONST. amend. VI.

278. Rosen-Zvi & Fisher, *supra* note 35, at 102–05; *see also* FED. R. CIV. P. 8(a), 12(b)(6).

279. *See* Posner, *supra* note 5, at 1505.

280. *See id.* at 1490–91.

281. *See id.* at 1490.

282. *See* U.S. CONST. amend. VI; *Dubreuil v. Witt*, 781 A.2d 503, 508 (Conn. App. Ct. 2001); Posner, *supra* note 5, 1490.

283. U.S. CONST. amend. VI.

284. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

285. *See* Rosen-Zvi & Fisher, *supra* note 35, at 92–93.

286. U.S. CONST. amend. VI; *see also* Rosen-Zvi & Fisher, *supra* note 35, at 92–93.

287. *See* U.S. CONST. amend. VI.

288. *See* HOWARD H. DANA, JR., TASK FORCE ON ACCESS TO CIV. JUST., REPORT TO THE ABA HOUSE OF DELEGATES 1 (2006); Rosen-Zvi & Fisher, *supra* note 35, at 151–52.

persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.”²⁸⁹ In a comparative context, the European Court of Human Rights has held that the right to counsel exists in cases where absence of counsel would result in cosmetic rights—which are “theoretical or illusory [rather than] practical and effective.”²⁹⁰ However, even if this right were extended to civil defendants, it would not help the private plaintiff who, unlike the criminal prosecutor, would still have to pay her way or proceed pro se.²⁹¹ While wealthy civil litigants can afford good legal representation, those with limited means have to proceed pro se, and are less likely to make legal arguments that would convince a judge.²⁹² Legal aid organizations and firms can lessen this disparity by offering pro bono representation, and judges can be more permissive in hearing pro se litigants, but these remedial measures are a far cry from the constitutional guarantee to representation in criminal cases or the experienced and publicly funded resources of a prosecutor’s office.²⁹³

This difference in the guarantee of legal representation has two potential effects.²⁹⁴ First, it can increase the divergence in the litigants’ private information, noted in the previous part.²⁹⁵ When both sides are assured legal representation, the legal rules, tests, and practices are familiar to their lawyers, and are therefore common information.²⁹⁶ Only the factual, as opposed to legal, information is private in the criminal case.²⁹⁷ However, in the civil case, neither side has a right to legal representation.²⁹⁸ This may result in a divergence of legal information that compounds the divergence in private factual information.²⁹⁹ Moreover, where litigants are less versed in the skills of direct and cross-examination, divergences in factual—as opposed to legal—beliefs are also likelier to persist.³⁰⁰ Second, if potential litigants are dissuaded by the cost of litigation, then the absence of a right to

289. DANA, *supra* note 288, at 1.

290. Airey v. Ireland, 2 Eur. Ct. H.R. 305, 314 (1979).

291. See COOTER & ULEN, *supra* note 2, at 62 n.11; FRIEDMAN, *supra* note 1, at 286; Rosen-Zvi & Fisher, *supra* note 35, at 92–93.

292. See COOTER & ULEN, *supra* note 2, at 62 n.11; FRIEDMAN, *supra* note 1, at 286.

293. See U.S. CONST. amend. VI; COOTER & ULEN, *supra* note 2, at 62 n.11; Rosen-Zvi & Fisher, *supra* note 35, at 92.

294. See Kuckes, *supra* note 204, at 18; Summers, *supra* note 53, at 498–99.

295. See COOTER & ULEN, *supra* note 2, at 383, 393.

296. See *id.* at 62, 393; Summers, *supra* note 53, at 502, 504, 506.

297. See COOTER & ULEN, *supra* note 2, at 393.

298. See Kuckes, *supra* note 204, at 3, 8, 18.

299. See Summers, *supra* note 53, at 499–500.

300. See *id.* at 499.

counsel in civil cases can skew civil litigation to the side of the well-heeled, whether plaintiffs or defendants, and the precedents emanating from the litigation of the rich may not be appropriate for regulating society as a whole.³⁰¹ In particular, many self-help options that are available to rich parties—such as alternative arrangements in case of a contract breach or self-insurance in case of a tort—are sometimes taken for granted in law.³⁰² Yet, these options can involve search and transaction costs that only the affluent can afford.³⁰³

If the guarantee of legal counsel is an advantage for the criminal defendant, then the nature of her adversary is a countervailing disadvantage.³⁰⁴ Criminal defendants are prosecuted by the government, whereas civil defendants are often sued by private parties—though government agencies also bring civil suits, in which case this difference is erased.³⁰⁵ Four distinctions follow from this point: first, the prosecutor has resources—particularly her relationships with law enforcement and the judiciary—that a private litigant does not, and this can create a power imbalance in the criminal case that, even if sometimes present, is not as stark in civil litigation.³⁰⁶ Second, the criminal prosecutor’s office is more experienced in criminal litigation than the typical civil plaintiff.³⁰⁷ Third, the prosecutor does not use her own private resources in litigation, whereas a civil plaintiff typically bears her costs, unless the court redistributes these costs after litigation.³⁰⁸ Fourth, the prosecutor is likelier to have political ambitions and pressures that affect her calculus in ways that are inapplicable to the typical civil plaintiff.³⁰⁹

301. See Rosen-Zvi & Fisher, *supra* note 35, at 101–04.

302. *Id.* at 91–92, 103, 120.

303. *Id.* at 90–91.

304. See Kuckes, *supra* note 204, at 18 (citing U.S. CONST. amend. VI).

305. See FRIEDMAN, *supra* note 1, at 288–89; Rosen-Zvi & Fisher, *supra* note 35, at 92.

306. Rosen-Zvi & Fisher, *supra* note 35, at 91–92.

307. Radek Gadek, *Prosecutor Career, Salary and Training Info*, CRIM. JUST. DEGREE, C., & CAREER BLOG, <http://www.criminaljusticeonlineblog.com/prosecutor-career/> (last updated Jan. 17, 2016).

308. COOTER & ULEN, *supra* note 2, at 400; Posner, *supra* note 5, at 1505; Rosen-Zvi & Fisher, *supra* note 35, at 102–105.

309. Jed Shugerman, “*The Rise of the Prosecutor Politicians*”: *Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880–2017*, SHUGERBLOG (July 7, 2017), <http://www.shugerblog.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/>.

IV. POSSIBLE REASONS FOR THE DIFFERENCES IN CRIMINAL AND CIVIL PROTECTION

Six possible reasons for this divergence are: (1) frivolous civil litigation may be a greater—costlier—problem than frivolous criminal litigation, since the former is brought by private parties that do not internalize costs, whereas the latter is brought by the government;³¹⁰ (2) courts offer greater leeway for criminal investigators to pursue leads in light of their institutional importance and experience;³¹¹ (3) *Miranda*,³¹² *Massiah*,³¹³ and related constitutional rights may make it difficult for criminal investigators to establish a substantial probability of guilt pre-trial;³¹⁴ (4) the harm from letting a criminal off may be greater than the harm from letting a civil wrongdoer off;³¹⁵ (5) the social value of a spectacle—public trial—may justify the trial even when the probability of guilt is relatively low;³¹⁶ and (6) the prosecutor may have private incentives for good behavior, or fewer incentives for bad behavior, than the civil plaintiff.³¹⁷

The first potential rationale dominated the Court's reasoning in raising the standard for civil complaints to plausible evidence.³¹⁸ *Twombly* and *Iqbal* were decided in 2007 and 2009, respectively, and civil “caseloads have declined 21% since reaching an apex of 19.5 million cases in 2009—an average of about -3.5% per year.”³¹⁹ This coincidence does not establish causation since the 2008 recession would have contributed in ways unrelated to the changed pleading standard; nevertheless, some “empirical studies have found that *Twombly* and *Iqbal* have increased the likelihood that motions to dismiss would be granted—at least for particular kinds of cases.”³²⁰

310. See FRIEDMAN, *supra* note 1, at 286–87, 289; Evans, *supra* note 218, at 3.

311. See Kuckes, *supra* note 204, at 21–22; Gadek, *supra* note 307.

312. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

313. *Massiah v. United States*, 377 U.S. 201, 207 (1964).

314. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Massiah v. United States*, 377 U.S. 201, 207 (1964).

315. See COOTER & ULEN, *supra* note 2, at 457–58.

316. See Mueller, *supra* note 20, at 6–7, 11.

317. See Gershowitz & Killinger, *supra* note 27, at 287–89; Rosen-Zvi & Fisher, *supra* note 35, at 99.

318. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007); see also FED. R. CIV. P. 8(a)(2).

319. COURT STATISTICS PROJECT, NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 4 (2016), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC%202015.ashx>; see also *Iqbal*, 556 U.S. at 666; *Twombly*, 550 U.S. at 548.

320. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 603 (2012); Reinert, *supra* note 39, at 2143–44; Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015*

Whether this over-litigation problem is real is an enduring point of contention.³²¹ For present purposes, though, we are interested in whether frivolous civil litigation is likelier than frivolous prosecution.³²² That impression perhaps rests on the assumption that criminal prosecutors internalize social costs and benefit better than civil plaintiffs do.³²³ However, this is far from obvious for at least two reasons: first, if frivolous litigation is understood to mean litigation that is unlikely to be successful, or litigation that unduly vexes the defendant, then a great deal of criminal litigation appears frivolous as well.³²⁴ Prosecutorial caseloads that stretch far beyond their abilities are vexatious simply because the cases are unlikely to be tried responsibly.³²⁵ Second, even if caseloads were lower, it is unclear that prosecutors internalize the public expenses of the investigation, the trial, or subsequent process, such as incarceration or parole; it is likewise unclear that prosecutors consider any public benefit beyond the benefits to their office of winning the trial or securing a guilty plea.³²⁶ It may be countered that in jurisdictions where prosecutors are elected or otherwise politicized, they consider social costs and benefits in roughly the same way that politicians do.³²⁷ However, the extent to which politicians do so is itself questionable; prosecutors, like politicians, may well lean toward important interest groups, such as law enforcement and wealthy constituents.³²⁸ The cost benefit analyses of these interest groups need not mirror the social calculus.³²⁹

A second possible rationale is institutional—low pre-trial criminal thresholds may reflect the judiciary’s deference to the expertise and institutional roles of the police and the prosecutor’s office.³³⁰ The police and

Amendments, 66 EMORY L.J. 1, 16 (2016) (citing Lonny Hoffman, Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss, 6 FED. CTS. L. REV. 1, 12 (2012); see also *Iqbal*, 556 U.S. at 666; *Twombly*, 550 U.S. at 548; COURT STATISTICS PROJECT, *supra* note 319, at 4.

321. *Twombly*, 550 U.S. at 558, 587; see also Evans, *supra* note 218, at 3.

322. See *Twombly*, 550 U.S. at 557–59; FRIEDMAN, *supra* note 1, at 287.

323. See FRIEDMAN, *supra* note 1, at 287–88; Gershowitz & Killinger, *supra* note 27, at 262–65.

324. See Gershowitz & Killinger, *supra* note 27, at 263–64.

325. *Id.* at 263.

326. FRIEDMAN, *supra* note 1, at 287–88; Gershowitz & Killinger, *supra* note 27, at 264.

327. See Gershowitz & Killinger, *supra* note 27, at 277.

328. See *id.*; DA’s, Prosecutors, Judges Continue to Feed the Police Brutality Beast, *supra* note 118.

329. See RANDALL G. SHELDEN, CTR. ON JUVENILE & CRIMINAL JUSTICE, INTEREST GROUPS AND CRIMINAL JUSTICE POLICY 3–4 (2011).

330. See Kuckes, *supra* note 204, at 22; Leong, *supra* note 5, at 2476–77, 2477 n.69.

criminal prosecutor have valuable experience in pursuing criminal matters.³³¹ Moreover, these two organs of the government have public mandates to act within their domains just as the judiciary does.³³² These institutional concerns—respect for expertise and political legitimacy—may dissuade courts from imposing demanding thresholds in the criminal case.³³³ The only civil cases where such institutional concerns limit courts are cases where the government is a party, typically as either an executive agency or a legislature.³³⁴ In these cases, courts are likewise deferential to the state, albeit under different doctrines: Chevron deference³³⁵ and rational basis review, respectively.³³⁶

A third possibility is that some of the enumerated constitutional restrictions on criminal inquiries so hamper the investigators as to make higher pre-trial thresholds fatal to the prosecution.³³⁷ Civil investigators can obtain evidence from their adversaries through discovery, whereas criminal investigators are hampered by the defendant's rights to an attorney and against self-incrimination,³³⁸ among others.³³⁹ Such restrictions would limit the criminal investigator at the trial stage, and the lower pre-trial thresholds may compensate for this disadvantage.³⁴⁰ The trouble with this reasoning, however, is the constitutional suggestion that criminal investigations should face higher hurdles than civil ones because of the notoriety and severity of criminal sanctions and the public expense of criminal trials.³⁴¹ If the lower thresholds compensate for higher constitutional protections, then the constitutional safeguards of criminal defendants have essentially been annihilated by other means.³⁴²

331. See Amici Curiae Brief of Former Federal Prosecutors et al. in Support of the Petitioner, *supra* note 80, at 16.

332. See *id.*; Leong, *supra* note 5, at 2477 n.69.

333. Amici Curiae Brief of Former Federal Prosecutors et al. in Support of the Petitioner, *supra* note 80, at 16; see also Kuckes, *supra* note 204, at 22–23.

334. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

335. See *id.* at 866.

336. *Chevron U.S.A. Inc.*, 467 U.S. at 866; *Romer v. Evans*, 517 U.S. 620, 631–32 (1996).

337. See U.S. CONST. amends. IV–VII; *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

338. U.S. CONST. amends. V–VI; FED. R. CIV. P. 26.

339. See *Miranda*, 384 U.S. at 474.

340. See Kuckes, *supra* note 204, at 22; Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 917–18 (1996).

341. See NAT'L CTR. OF VICTIMS OF CRIME, *supra* note 10, 4–5; Rosen-Zvi & Fisher, *supra* note 35, at 82.

342. See NAT'L CTR. OF VICTIMS OF CRIME, *supra* note 10, 4–5; Rosen-Zvi & Fisher, *supra* note 35, at 82.

The fourth rationale is similarly questionable; the stigma associated with criminal behavior is obvious—evidenced by such literary tropes as scarlet letters and such contemporary practices as sex offender registries.³⁴³ The media’s obsession with crime, both real life and fictitious, nurtures this notoriety.³⁴⁴ The criminal wrong tends to generate more interest and coverage than the civil wrong.³⁴⁵ In light of these trends, it is arguable that the state is more reluctant to terminate a criminal investigation than a civil one, for fear that it may face special opprobrium for any failure in catching criminals.³⁴⁶ Tough on crime slogans, law and order candidates are meant to signal commitments to the aggressive prosecution of crimes.³⁴⁷ Such an aggressive approach may encourage the setting of low thresholds for criminal investigations.³⁴⁸ The state may wish to thereby err on the side of over-deterrence in crime.³⁴⁹ However, this argument appears to suffer from the same problem as the last—it appears to disregard, or nullify, the constitutional protections that appear to privilege criminal defendants over civil ones.³⁵⁰ Insofar as constitutional rights, which are meant to provide a measure of counter-majoritarian security to the vulnerable, this rationale, like the last, appears to directly undermine constitutional intent.³⁵¹

343. Carolyn E. Frazier, *Today’s Scarlet Letter — the Sex Offender Registry — Is Risky Justice for the Youth*, CHI. TRIB.: COMMENT. (May 26, 2017, 1:31 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-sex-offenders-list-teens-risk-perspec-0529-md-20170526-story.html>.

344. IAN MARSH & GAYNOR MELVILLE, *CRIME, JUSTICE AND THE MEDIA* 1–2 (2009).

345. See *id.*; Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND CIV. JUST. INST. 2 (2011), <http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum%20Galanter-Frozena%20Paper.pdf>.

346. See *The Role of Pressure Groups*, EVERYONE’S PARLIAMENT, http://www.parliament.qld.gov.au/documents/explore/education/factsheets/factsheet_8.4_PressureGroups.pdf (last updated July 2015); Gershowitz & Killinger, *supra* note 27, at 287.

347. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 3 (1997); David Alan Sklansky, *The Problems with Prosecutors*, ANN. REV. CRIMINOLOGY 451, 455 (2018). “[P]ublic opinion polls indicate that members of the public have become more likely to support punitive policies such as the death penalty and *three strike* sentencing laws.” BECKETT, *supra*, at 3.

348. See Gershowitz & Killinger, *supra* note 27, at 263; Sklansky, *supra* note 347, at 456.

349. Rosen-Zvi & Fisher, *supra* note 35, at 89–90.

350. See U.S. CONST. amend. VI; Kuckes, *supra* note 204, at 14; Gershowitz & Killinger, *supra* note 27, at 263.

351. See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 285 (2010).

The fifth explanation focuses squarely on the political functions of litigation.³⁵² The public nature of the criminal trial gives it a communicative, perhaps even theatrical, character that the typical civil trial lacks.³⁵³ The Constitution itself is uniquely political among other legal sources, insofar as much of it speaks in vague platitudes, rather than detailed rules.³⁵⁴ Therefore, it stands to reason that the main stage, where constitutional restrictions are applied, would be the most public phase of lawmaking—the criminal trial before a jury of peers.³⁵⁵ Protections at earlier stages are relatively invisible to the public and do not serve the purpose of communicating the government’s constitutional commitments as well as the trial does.³⁵⁶ Highlighting these protections at the trial stage, rather than at the pre-trial stage, affords the criminal defendant protections at the time that he is most visible to the polity.³⁵⁷ This explanation, however, is only partial; it may offer an account for why criminal trials have higher thresholds than civil ones, but it does not tell us why pre-trial civil protections should be higher than the corresponding criminal ones.³⁵⁸

A sixth rationale for the disjunction between criminal and civil investigations is the distinction, not between the prosecutor’s purportedly public and the civil plaintiff’s private motives, but between the peculiar purely private motives of the two.³⁵⁹ Winning cases may not be as important to the civil plaintiff as the prosecutor.³⁶⁰ The civil plaintiff may push for further investigation merely to intimidate the defendant, or potential future defendants, or to hold out for a high settlement.³⁶¹ The prosecutor, on the other hand, builds her reputation on successful trials and statistics such as the percentage of cases argued and won.³⁶² These reputational concerns may

352. See Rosen-Zvi & Fisher, *supra* note 35, at 117 & n.127, 118.

353. See U.S. CONST. amend. VI; Kristin D. Brudy & Norman Finkel, *The Drama of the Courtroom: Media Effects on American Culture and Law* (Mar. 31, 2016) (unpublished Psychology Honors Thesis, Georgetown University) (on file with Georgetown University).

354. Howard Kaplan, *Constitution as Legal Document*, INSIGHTS ON L. & SOC’Y, Spring 2015, at 2, 3; Benjamin David Steele, *The Vague and Ambiguous US Constitution*, MARMALADE (Dec. 1, 2015), <http://www.benjaminsdavidsteele.wordpress.com/2015/12/01/the-vague-and-ambiguous-us-constitution/>.

355. See Kuckes, *supra* note 204, at 17; Mueller, *supra* note 20, at 5–6; *Difference Between Grand Jury and Trial Jury*, *supra* note 103.

356. See Kuckes, *supra* note 204, at 21.

357. See *id.* at 21–22.

358. See *id.* at 24 n.132.

359. Posner, *supra* note 5, at 1486, 1505.

360. See *id.* at 1505.

361. FRIEDMAN, *supra* note 1, at 286; Posner, *supra* note 5, at 1490.

362. See Posner, *supra* note 5, at 1505.

give the prosecutor a strong private incentive to quickly drop cases that are unlikely to be won at trial and to focus resources on those cases that would survive the high constitutional thresholds in court.³⁶³ If this is right, then it would also provide prosecutors an incentive for farsightedness—a strong interest in predicting eventual trial outcomes early in the process and in terminating investigations that are unlikely to bear fruit.³⁶⁴ However, an expectation of such foresight seems misplaced in light of the overwhelming caseloads that prosecutors appear to carry.³⁶⁵

V. CONCLUSION

Taken in isolation, neither the clamp down on civil litigation, nor the expansion of criminal litigation seems surprising.* Too many civil cases do impose a great cost on society, as does crime.³⁶⁶ However, taken together, they appear to pose a paradox.³⁶⁷ The civil system is, in many cases, a cheaper substitute for criminal prosecutions.³⁶⁸ We would, therefore, expect that over time, criminal prosecutions would decline and civil litigation would increase, as claims migrate from the former regime to the latter.³⁶⁹ Yet, the trend we observe seems to be the exact opposite.³⁷⁰

To hazard a speculation, the reason for this puzzling evolution may be pressure from the powerful stakeholders in the criminal and civil systems: law enforcement, politicians, prosecutors in the former, and powerful private institutions in the latter.³⁷¹ Legal devices evolve under the pressure of interest groups, even when the views of such groups are questionable.³⁷² The loosening of protections for criminal defendants likely arose from the steady

363. See *id.*; Sklansky, *supra* note 347, 455–56.

364. See Posner, *supra* note 5, at 1505; Sklansky, *supra* note 347, at 453, 455–56.

365. See MANN, *supra* note 35; Sklansky, *supra* note 347, at 455.

366. See COOTER & ULEN, *supra* note 2, at 385, 457–58, 460; *What Are “Costs” in a Civil Lawsuit?*, LAWYERS.COM, <http://www.lawyers.com/legal-info/research/court-costs-in-civil-lawsuits.html> (last visited Apr. 18, 2018).

367. See COOTER & ULEN, *supra* note 2, at 403–04; MANN, *supra* note 35.

368. See COOTER & ULEN, *supra* note 2, at 397, 400; MANN, *supra* note 35.

369. See COOTER & ULEN, *supra* note 2, at 443; FRIEDMAN, *supra* note 1, at 286; Rosen-Zvi & Fisher, *supra* note 35, at 92–93.

370. See COURT STATISTICS PROJECT, *supra* note 319, at 2, 4, 11; Galanter & Frozena, *supra* note 343, at 3, 6; John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, PEW RES. CTR. (Mar. 28, 2017), <http://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/>.

371. Sklansky, *supra* note 347, at 453–54, 463; *The Role of Pressure Groups*, *supra* note 346.

372. *The Role of Pressure Groups*, *supra* note 346.

public and political pressure for a tougher stance on crime, greater support for the police and prosecutors, and more penalties for criminal offenders.³⁷³

On the other hand, the extension in protections for civil defendants was likely a response to pressure for lower damage awards, stronger firewalls against vexatious lawsuits, and a lower caseload for courts.³⁷⁴ Ironically, the reasons for increasing protections on the civil side can, with minor changes, be applied to criminal cases as well, while the reasons for decreasing criminal protections can likewise be applied to the civil system.³⁷⁵ If the civil system is bloated, then so too is the criminal one.³⁷⁶ If there is a need to reduce criminal wrongs, there is also a need to reduce civil ones.³⁷⁷ The opposite pressures observed on the civil and criminal systems seem to stem not from a principled distinction between the two, but rather from the contrasting views of the dominant interest groups in play.³⁷⁸

The Constitution also seems to press for the opposite trend; since many protections were created explicitly for the criminal defendant, and not the civil one, absent doctrinal evolution, we would have expected litigation to migrate from the criminal system to the civil one over time.³⁷⁹ The criminal caseload would decline, while the civil caseload would increase.³⁸⁰ Insofar as the criminal system involves greater deadweight losses, by incarcerating wrongdoers, and thereby removing them from the economy than the civil one, which only redistributes wealth—this constitutional result may have been a welcome development.³⁸¹ However, the evolution of legal doctrine sketched in this Article shows that such a result never materialized.³⁸² Instead, the criminal system continues to grow, while civil litigation is slowing down.³⁸³ This state of affairs seems irreversible at this

373. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 80–82 (2011).

374. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (Stevens, J., dissenting); Evans, *supra* note 218, at 2, 5–6.

375. Rosen-Zvi & Fisher, *supra* note 35, at 146, 151–52; *see also* Evans, *supra* note 218, at 2, 5–6.

376. *See* COURT STATISTICS PROJECT, *supra* note 319, at 1, 4; Gershowitz & Killinger, *supra* note 27, at 263–64.

377. *See* COOTER & ULEN, *supra* note 2, at 457–58, 460–61; FRIEDMAN, *supra* note 1, at 281.

378. *See* SHELDEN, *supra* note 329, at 3.

379. *See* U.S. CONST. amend. V; *but see* COURT STATISTICS PROJECT, *supra* note 319, at 1, 4; Refo, *supra* note 215, at 2.

380. *See* Gramlich, *supra* note 370; *but see* COURT STATISTICS PROJECT, *supra* note 319, at 1, 4.

381. *See* COOTER & ULEN, *supra* note 2, at 457–60; FRIEDMAN, *supra* note 1, at 284, 286.

382. *See* COURT STATISTICS PROJECT, *supra* note 319, at 1, 4.

383. *See id.*; Refo, *supra* note 215, at 2.

point, but it appears, both constitutionally and pragmatically, to be a perverse result.³⁸⁴

384. *See* COURT STATISTICS PROJECT, *supra* note 319, at 1, 4; Refo, *supra* note 215, at 2.